

Analysis and Trial Practice Tips from *Apple v. Samsung*

What trial lawyers need to know at jury selection is exemplified in this case.

Bias or Misconduct? The Billion-Dollar Question*

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Analysis of Jury Issues in Apple v. Samsung. The *Apple v. Samsung* August 2012 verdict dealt with infringement of Apple's iPhone by Samsung's Galaxy's phone. A California jury returned a verdict in favor of Apple for Samsung's infringement and dilution of a range of patents and trade dresses. The jury verdict put Samsung on the hook for \$1 billion. Samsung filed a motion for a new trial claiming juror misconduct by the foreperson.

From *Apple v. Samsung* jurors' media interviews, we learned about their decision-making process, especially the talkative foreperson. Samsung claimed that Mr. Velvin Hogan, the foreperson, improperly presented extraneous prejudicial information during deliberations. Mr. Hogan told the media, he had an "aha, moment" about Apple's patent while reflecting at home the first evening of deliberations. Imagining himself in the shoes of the patent holder, he decided to support Apple's patent. The next day Mr. Hogan laid out his perspective for the rest of the jurors. During jury deliberations, there was no extraneous information searched. There were no Google searches, no dictionaries, no encyclopedias, no extraneous knowledge of other cases from these two parties and no communication about premature decision-making.

What is Juror Bias? Was there juror bias in this *Apple v. Samsung* case? Absolutely. Was it juror misconduct? According to U.S. District Judge Lucy H. Koh, it was not. In Federal Court, despite statements made post verdict, jurors cannot impeach themselves as to the mental processes in decision-making. While the foreperson was biased, the threshold for misconduct was *not* met. Judge Koh says, "Jurors are expected to bring their own personal experiences with them into the courtroom, and may generally rely on their personal knowledge or past experiences when hearing the evidence, deliberating, and deciding their verdict so long as they do *not* have knowledge related to the specific case they are deciding."

Prior experience is the biggest predictor for jurors' bias in any case. The closer the juror's experience to the epicenter of the case, the stronger the bias. Holding a patent is at the epicenter of this case. Mr. Hogan obtained a patent in 2008 for video compression software and has a second patent application currently pending. Pre-verdict, the parties may have gambled on which way Hogan, a patent holder, would go. (Another patent holder was excused during jury selection.)

Can Jurors Be Fair? What does fair and impartial mean? The law takes jurors at their word since we do not see directly into their minds. Jurors unaware of their own bias are deemed truthful. Answers to the billion-dollar question, “Can you be fair?” may not be enough in complex cases. It is difficult for a juror to admit they cannot be fair. Some jurors recognize their own bias and readily admit their position. An honest “no” gives jurors an opportunity to be fair to the parties or be relieved of jury duty.

In *Apple v. Samsung*, the judge inquired if anyone had strong feelings about the case, the parties, charges and claims that you could not be fair and impartial. Five jurors raised their hands. Mr. Hogan was not among that group. Jurors were asked if anything they had read or heard about this case would affect their ability to be fair and impartial. Two prospective jurors raised their hands when asked if they had already formed an impression about who they thought should win the case. Mr. Hogan was not among that group either.

The Court asked whether anyone had any special interest, financial, or otherwise, in the outcome of the trial as well as whether the jurors could follow the law as instructed by the judge. Mr. Hogan agreed. When asked whether any of the jurors had been negatively impacted by the recent economic downturn, Mr. Hogan disclosed about a foreclosure on his house after his start-up company went belly up. When asked about involvement with lawsuits, Hogan disclosed that his programmer sued him after the company went belly up. At issue in Samsung’s motion for a new trial was an additional lawsuit in Mr. Hogan’s past that he did not disclose during voir dire. Hogan did not disclose being sued by his former employer, Seagate in 1993, nor his bankruptcy filing six months after being sued by Seagate.

During voir dire, Hogan said he was in the hard drive industry for 35-plus years as an electrical engineer. He worked for Memorex, Digital Equipment Corporation, Caylis Memories, Storage Technology Corporation, Seagate Technology, Micropolis Corporation, and Quantum. Samsung did not express concerns about Mr. Hogan’s past employment at Seagate. Samsung learned of Mr. Hogan’s more current bankruptcy during voir dire. Samsung learned about the lawsuit with Seagate when it obtained Mr. Hogan’s bankruptcy file, after the end of the trial.

Samsung alleged that Mr. Hogan gave dishonest answers during voir dire and that statements he made in interviews given after the verdict indicate bias. While Mr. Hogan never mentioned during voir dire that he had a lawsuit with Seagate nearly twenty years ago, Judge Koh says that Samsung had time to discover this relationship in voir dire or during the course of the trial. (Samsung as of 2011 is a shareholder of Seagate.) By not asking Hogan about his relationship with Seagate, the Court found that Samsung either conceded that the relationship was too remote to give rise to a serious claim or took a calculated risk.

What is Juror Misconduct? Juror misconduct occurs when the jurors introduce extraneous evidence into deliberations or communicate with a party during trial. In *Twelve Angry Men*, Henry Fonda's character introduces a replica of the knife used in the murder of the defendant's father. While the movie glorifies the deliberation process in setting an innocent man free, the outside evidence triggers juror misconduct. Juror misconduct is more visible today since jurors often reveal themselves through social media or traditional media interviews.

Stealth Jurors. Jurors who hide their bias to remain on the jury are known as stealth jurors. A stealth juror, like Nicholas Easter in *Runaway Jury*, knowingly stays undercover to manipulate a result for a particular cause. Samsung claimed that Hogan lied in order to obtain a seat on the jury and that he inappropriately introduced extraneous prejudicial information into jury deliberations. We may never know whether Mr. Hogan forgot about the earlier lawsuit with Seagate, attempted to conceal it, or believed his response regarding his more recent lawsuit with his programmer was sufficient for voir dire. Hogan mentioned a bankruptcy and Apple claims if Samsung timely obtained his file, Samsung would have known about the Seagate lawsuit while the trial was in progress, not after there was a verdict against them.

Message to the Industry. Noted in Judge Koh's opinion, Mr. Hogan expected to be dismissed from the jury because of his experience, but was "very grateful to have been part of this case." "... except for my family, it was the high spot of my career. You might even say my life." Mr. Hogan was pleased that he was selected for the jury because [he] wanted to be satisfied from [his] own perspective that this trial was fair, and protected copyrights and intellectual property rights, no matter who they belonged to." In other interviews, Mr. Hogan disclosed that "the jury wanted to send a message to the industry at large that patent infringing is not the right thing to do, not just Samsung." And that the "message they sent was not just a slap on the wrist."

Trial Practice Tips. There are several lessons learned from this case about social desirability characteristics, flushing out stealth jurors, and asking follow up questions during voir dire. Trial practice tips to consider in your next trial include:

- *Scientific Jury Research.* Recognizing bias in jurors is easier if you have clues. Scientific jury research gives predictors about experiences at the epicenter of the case that indicate preference for the plaintiff or for the defense.
- *Jury Questionnaires.* A jury questionnaire elicits personal information and red flags. Avoid exposing red flags in open court that will bias other jurors. Learn more about answers marked private at sidebar.
- *Voir Dire.* Use time wisely with follow up questions. A simple, "Anything else?" may trigger additional responses. Avoid asking questions using "not," since negatives confound the answer. When you learn about a critical

experience such as a bankruptcy, let jurors know that judges allow you to check records. They may be more forthcoming during voir dire.

- *Detecting Social Desirability Characteristics.* Judges rehabilitate jurors and the presence of the black robe often makes jurors say they will be fair. Biased jurors often exhibit social desirability characteristics. There are biased jurors who may believe as the foreperson under question in *Apple v. Samsung* that they are trying to do the right thing for the industry. Ask jurors why they want to sit on this case.
- *Detecting Lying Behavior in Stealth Jurors.* Pay attention to jurors' emotions and body language while answering in voir dire. It is trickier to detect micro-expressions in jurors who hide their emotions. Stealth jurors may be strategic in withholding information or outright lying about their experiences or attitudes. Probe further on related experiences or leadership positions if you suspect a stealth juror.
- *Deselecting Jurors.* Judges take jurors at their word that they can be fair. That is why we have peremptory challenges. Abide by *Batson* and *J.E.B.* rulings.
- *Court Instructions on Social Media Use.* With the increase of smart phones, notebooks, and laptops, jury misconduct falls into two major categories – extraneous information introduced into deliberations or jurors communicating about the case during trial. Court instructions on banning Google searches and communicating online must be repeated. Give jurors parameters of what is allowed regarding social media use and ask jurors to sign a pledge to stick to it for the duration of the trial.
- *Obligation to Investigate Jurors.* If there are matters that need further investigation such as looking at jurors' personal involvement in lawsuits, complete due diligence immediately and disclose to the Court. Remaining silent on an issue and complaining that the verdict was prejudicially influenced by that misconduct is viewed as gambling on the verdict.
- *Post Verdict Jury Interviews.* Listen carefully in jury interviews for extraneous information brought into the jury room. Bias exists in everyone and learning about the deliberation process assists in presenting at the next trial.

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